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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DALE B. KAYE, as Successor Trustee, etc.,

Petitioner and Appellant,

v.

KAREN MURRAY, as Successor Trustee,
etc.,

Objector and Respondent.

D053358

(Super. Ct. No. PN28664)

APPEAL from an order of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

Petitioner and appellant Dale Kaye (Dale), as a successor co-trustee of a trust established by his late parents (the trust), filed this petition under Probate Code¹ section 17200, to seek instructions regarding enforcement of the trust's no contest clause against his sister Karen Murray, who is also a successor co-trustee (Karen). At that time, the

¹ All further statutory references are to the Probate Code unless noted. To avoid confusion, we refer to the parties by their first names.

parties had entered into a stipulation, approved by the probate court, providing that both Dale and Karen were the successor co-trustees of the Trust.

After demurrer proceedings and the amendment of the petition, Karen brought another demurrer that was sustained without leave to amend, for failure to state a cause of action. Dale appeals, contending that the probate court erroneously refused to allow further proceedings to construe the language of the no contest clause, by taking extrinsic evidence about the intent of the trustor. Dale also contends that the probate court misinterpreted his allegations in support of his claim that Karen should be disinherited for certain actions that he believes amounted to contesting the trust.

On de novo review of the ruling on demurrer, we agree with the probate court that the amended petition, as a matter of law, fails to allege facts sufficient to state any cause of action for seeking legitimate instructions under the trust. (§ 17200.) The demurrer was properly sustained without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

A. Creation of Trust; 2005 Filing of "Trustee Identity Petition"

For purposes of analyzing the demurrer, the courts will accept as true the facts alleged in the petition. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Although Dale has set forth an exhaustive factual background in his briefs on appeal, not every detail is important to the resolution of the legal issues presented. This trust was created in 1988 by the parties' parents, and after their mother passed away, their father restated the trust in 2002. Both Karen and Dale were named as beneficiaries and successor co-trustees of the Trust. The trust's no contest clause states:

"NO CONTEST - CONTESTANT DISINHERITED: A contestant shall be considered to have predeceased both Trustors without surviving issue and not to be in existence at the time of either Trustor's death. For purposes of this instrument, 'contestant' means any person other than the Trustors who, *directly or indirectly, voluntarily participates in any proceeding or action in which such person seeks to void, nullify, or set aside (1) any provision of this instrument; (2) any provision of either Trustor's will that gives property to the Trustee of any Trust under this instrument; or (3) any amendment of this instrument or codicil of either Trustor's will.*" (Italics added.)

According to documents lodged with the petition, Karen conducted the business of the trust from 2002 to 2005, but Dale did not. Father died in March 2005, survived by Dale and Karen.² Each party sent out a notice under section 16061.7, entitled "Notification of Trustee," stating that each would be serving as co-trustee. However, disputes ensued about the management of the trust, and Karen's attorney communicated to Dale's attorney that she was now the sole trustee: "Because Dale effectively rejected the trust years ago, he is not now in a position to take any action as trustee."

On June 13, 2005, Dale filed a petition for "Instructions Regarding Identity of Co-Trustees" (the "Trustee Identity Petition"). He sought an order under section 15603, that he was a duly appointed and acting trustee under the trust, and his incumbency was shown by the court file.

In response, in July 2005 Karen filed her objections to the Trustee Identity Petition. She stated that since 2002, Dale had refused to assist her in the administration

² Dale and Karen also have a brother, Ronald, who was a beneficiary under the trust. Dale claims there were underlying issues about the distribution of trust assets regarding Ronald's entitlement. However, there are no issues on appeal about Ronald's status under the trust, and the merits of the trust distribution provisions are not before us.

and management of the trust estate, and accordingly he had rejected the trust so that she was effectively the sole acting trustee. (§ 15601 [a named trustee may reject the trust].) She sought an order that Dale had waived the right to serve as a co-trustee. (§ 15621 [a co-trustee may act in the absence of another where there is a vacancy in the office].)

According to the allegations of the amended petition before us, on January 3, 2006, the parties stipulated and the probate court entered an order that Dale and Karen were the successor co-trustees of the Trust since March 9, 2005, the date of their father's death (hereafter the stipulation).

B. Current Litigation and Ruling

On August 29, 2007, Dale filed his original petition for instructions "Regarding Enforcement of the No Contest Clause against Beneficiary." (§ 17200, subd. (b).) Dale alleged that when Karen had failed to consult him on trust administration after the death of their father, and when she filed her objections to his 2005 Trustee Identity Petition, she had violated the no contest clause, and therefore forfeited her interests under the trust. The petition relied on section 17200, subdivision (b), allowing a party to seek relief from the court in proceedings concerning the internal affairs of a trust, such as: "(1) Determining questions of construction of a trust instrument. [¶] (3) Determining the validity of a trust provision. [¶] . . . [¶] (6) Instructing the trustee. [¶] . . . [¶] (10) Appointing or removing a trustee."

Karen, as co-trustee, brought a general demurrer to the petition, contending it failed to state a cause of action, and that even if the facts alleged were true, they were not sufficient to support any finding that she had violated the no contest clause.

After receiving opposition and holding a hearing, the probate court sustained the first demurrer with leave to amend. At the hearing, the court discussed other pending petitions in the matter, regarding alleged breaches of duty by Karen and her request for instructions, and pending accountings. The court inquired how the parties could possibly settle their disputes, and consolidated some forthcoming hearings.³

The probate court's order on the first demurrer addressed the issues as follows: First, the words "proceeding or action" in the no contest clause referred to legal proceedings or actions, not simply the commission of an act (such as Karen's conducting of trust business without consulting Dale, etc.) Next, the court ruled that whatever the true nature of Dale's Trustee Identity Petition was, Karen's objections to his request were protected filings within the meaning of the safe harbor provisions of section 21305, subdivision (b)(7) (to allow pleadings regarding the appointment or removal of a fiduciary).

Dale duly filed his first amended petition for instructions. He again asked the probate court to construe the meaning of the word "action" in the no contest clause, and therefore to instruct him, as a successor co-trustee, on the subject of whether Karen's conduct and activities had violated the no contest clause so that she should be disinherited.

Karen filed another demurrer, on the ground that the petition failed to state sufficient facts to constitute a cause of action. Even if Dale's allegations were all true,

³ A related appeal is currently pending in this court and is in the briefing stages. (*Kaye v. Murray*, D054356.) We denied a request to consolidate these appeals.

she argued they would still not support an order that Karen had violated the no contest clause. Opposition was filed.

At oral argument, the probate court discussed with counsel whether Dale's amendments had added any new allegations that were actionable. The court stated that the petition continued to suffer from the same infirmities identified previously, "in that none of the actions listed in the amended petition violate the no contest clause." The written order did not expressly set forth the grounds of the ruling, merely stating that Karen's demurrer was sustained without leave to amend. Dale appeals.

DISCUSSION

Dale argues that his petition for instructions was not properly subject to demurrer, because he satisfied statutory pleading standards under section 17200 et seq., as a matter of law. He claims he should be entitled to pursue further proceedings, to present evidence about the trustor's intent as shown by the no contest clause, and therefore about whether Karen's administrative activities as a co-trustee and her filing of objections to his 2005 Trustee Identity Petition may qualify as "contests" of trust provisions.

To address these arguments, we set forth rules for review and statutory standards for evaluating such petitions, and apply them to these allegations.

I

STANDARD OF REVIEW; INTERPRETATION OF TRUST

For purposes of analyzing the ruling on demurrer, we take as true the allegations in the pleading. (*Blank v. Kirwan, supra*, 39 Cal.3d 311, 318.) We give the petition a reasonable interpretation, reading it as a whole, its parts in their context, to determine

whether sufficient facts are stated to constitute a cause of action. (*Ibid.*) Although we accept as true all facts properly pled in the complaint, we do not assume the truth of "contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*).) The petitioner has the burden of proving the possibility of cure of any deficiencies by amendment, and if it is reasonably possible the pleading defects can be cured, the trial court abuses its discretion by not granting leave to amend. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.)

In ruling on this demurrer, the probate court was required to apply statutory standards to the pleaded facts. Determining the meaning of a statutory standard requires the resolution of a question of law. (*People ex rel Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) "The soundness of the resolution of such a question is examined de novo. [Citations.]" (*Ibid.*)

In *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453, this court set forth well established guidelines for interpreting trust documents:

"[I]t is proper for the trial court in the first instance and the appellate court on de novo review to consider the circumstances under which the document was made so that the court may be placed in the position of the testator or trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite, or ambiguous in some respect. [Citation.] . . . [¶] Particularly in the field of interpreting trusts and wills, each case depends upon its own peculiar facts, and ' . . . precedents have comparatively small value. . . . ' [Citations.]"

At the pleading stage of the proceedings, where issues of credibility or conflicting evidence have not yet arisen, a trial court's interpretation of a will or trust instrument presents a question of law. (*Burch v. George* (1994) 7 Cal.4th 246, 254 (*Burch*).) The

appellate court likewise independently construes the trust instrument. (*Ibid.*) No contest clauses are strictly construed. (*Ibid.*)

A petitioner seeking to establish that a trust provision is ambiguous may appropriately allege a specific proposed construction of the instrument's language. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.) Where the question on appeal is whether a pleading is sufficient, a reviewing court will accept as correct the plaintiff's specific allegations as to the meaning of the disputed language, but only "[s]o long as the pleading does not place a clearly erroneous construction upon the provisions of the [document]. [Citation.]" (*Ibid.*) The court treats such alleged ambiguities as presenting questions of law. (*Ibid.*, citing *Hillman v. Leland E. Burns, Inc.* (1989) 209 Cal.App.3d 860, 866.)

II

ANALYSIS; STATUTORY SCHEME

"No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. [Citations.] Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator's intent." (*Burch, supra*, 7 Cal.4th 246, 254.)

This dispute focuses upon certain language of the no contest clause, which we must interpret *de novo*, in accordance with the above stated standards governing instructions to trustees. (§ 17200 et seq.) This clause would disinherit a "contestant," meaning, "any person . . . who, directly or indirectly, voluntarily participates *in any*

proceeding or action in which such person seeks to void, nullify, or set aside (1) any provision of this instrument" (Italics added.) We are instructed by *Burch, supra*, 7 Cal.4th 246, 254, to strictly construe this clause.

The general requirements for pleading such a petition for instructions to a trustee are set by statute. Section 17201 requires the petition to state "facts showing that the petition is authorized under this chapter. The petition shall also state the grounds of the petition and the names and addresses of each person entitled to notice of the petition."

Under section 17200, subdivision (b), Dale alleged that he required instructions about the internal affairs of the trust, particularly "(1) Determining questions of construction of a trust instrument. [¶] . . . [¶] (10) Appointing or removing a trustee." Dale's specific allegations about how Karen allegedly violated this no contest clause included her "actions" in conducting trust business without Dale's input, and in sending out a notice identifying herself as the sole trustee, thus refusing (for a time) to acknowledge Dale as co-trustee. Dale claimed she additionally violated the trust's no contest clause when she filed her objections to Dale's Trustee Identity Petition, because her motives were questionable and may have amounted to a contest of the trust provisions, i.e., seeking to "*void, nullify, or set aside*" trust provisions about his appointment.

To plead an authorized set of allegations (§ 17201), Dale had to bring his petition within the appropriate scope of instructions that could have been given to him as a co-trustee, under section 17200. We evaluate his allegations according to those statutory standards. First, with respect to his claim that the no contest clause contained ambiguities

that should be construed by a court, the phrase, "participates in any proceeding or action," does not as a matter of law support or require a construction that the various activities of trust administration that Karen engaged in qualified, as a matter of law, as the type of "action" amounting to a contest of trust provisions. (§ 17200, subd. (b)(1) [construction of a trust instrument].) The probate court correctly interpreted the terminology of the no contest clause within the standards of the statutory scheme for trust interpretation and operation, to resolve questions of law, by finding that her activities were not the functional equivalent of contesting the trust as a whole. (*People ex rel Lockyer v. Shamrock Foods Co.*, *supra*, 24 Cal.4th 415, 432; see Code Civ. Proc., § 22 [defining "action" as a proceeding in a court of justice, etc.])

Next, as to whether Dale successfully pleaded that Karen's activities amounted to efforts "*to void, nullify, or set aside*" trust provisions, the probate court did not have to accept his pleaded versions of the relevant facts about the violation of the clause (that Karen had bad motives or was using subterfuge to oppose Dale's service as a co-trustee). (§ 17200, subd. (10) [appointment or removal of a trustee].) Rather, Dale is pleading conclusory allegations rather than ultimate facts, and we may not assume the truth of such "contentions, deductions or conclusions of law." (*Aubry*, *supra*, 2 Cal.4th 962, 967.) Although he could plead basic facts about the serious disputes about trust administration, he cannot convert them into his own characterization of the ultimate facts and create a remedy that is not otherwise available. That would require an excessively broad characterization of the no contest clause. (*Burch*, *supra*, 7 Cal.4th 246, 254.)

It is particularly difficult to interpret Dale's claims that Karen was contesting the trust in this manner, since she had stipulated with him and obtained the probate court's approval of their service as co-trustees, well before the current petitions were brought. Dale claims this was some kind of subterfuge by Karen, but his characterization of the stipulation does not stand up to analysis.

Moreover, Karen's activities as co-trustee, as pled, could not amount, as a matter of law, to "nullifying" or "voiding" a trust provision, since those terms of art usually refer to court orders of some kind. Rather, we should not accept as correct Dale's allegations as to the meaning of the disputed clause, because we think those allegations put "a clearly erroneous construction upon the provisions of the [document]. [Citation.]" (*Aragon-Haas, supra*, 231 Cal.App.3d 232, 239.)

With respect to Karen's acts of filing her objections in a court proceeding that Dale initiated, we agree with her that the gist of those objections was not actually asking the court to disregard the trust, but instead to present her position that Dale's recent actions had actively rejected the trust, so that he should not be allowed to serve as trustee under its terms. (§ 15601.) Her objections did not seek to "void, nullify or set aside" any trust provisions, but rather to interpret and apply them, within the governing statutory scheme. (§ 15621.) Even acknowledging the facts that Karen filed those objections, the petition still does not state a cause of action for an alleged contest of trust provisions because she was essentially affirming the trust by bringing forward her position on its proper administration. (§ 16000 et seq. [duties of trustees].)

When we evaluate the trust language in an effort to enforce the intent of the trustor, and when we view the case on its own facts, we are unable to conceive of how Karen's alleged activities as co-trustee somehow triggered the trust's no contest provision. (See *Wells Fargo Bank v. Marshall*, *supra*, 20 Cal.App.4th 447, 452-453.) Dale's amended petition does not set forth facts showing an entitlement to the requested instructions, whether under section 17200, subdivision (b)(3) (determining the validity of a trust provision) or subdivision (b)(6) (instructing the trustee). The probate court's determinations on the nonviability of this pleading were appropriately made on demurrer, because the allegations of the petition, even if assumed to be true, are not subject to being construed as stating a viable cause of action for invoking this no contest clause.

Because of our conclusions set forth above, we decline to discuss the alternative issues of whether Karen's trust administration activities or filing of objections also fell within the scope of the safe harbor provisions applicable to no contest clauses. (§ 21305, subd. (b) [providing with some exceptions that certain types of proceedings, as a matter of public policy, do not violate a no contest clause].)⁴ The trial court's first demurrer order made extensive findings on that subject, and those rulings were essentially confirmed orally, at the hearing on the second demurrer (but not in writing).

Nevertheless, we review only the legal sufficiency of the order or judgment on appeal,

⁴ Under section 21305, subdivision (b), a "safe harbor" is provided for, e.g., "(7) A pleading regarding the appointment of a fiduciary or the removal of a fiduciary. [¶] (8) A pleading regarding an accounting or report of a fiduciary. [¶] (9) A pleading regarding the interpretation of the instrument containing the no contest clause or an instrument or other document expressly identified in the no contest clause." These sections are being repealed and reenacted effective in 2010.

not the reasoning of the trial court. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) The order sustaining the demurrer without leave to amend was correct as a matter of law, without any determination on appeal becoming necessary about whether Karen's objections and activities qualified under the safe harbor provisions. (§ 21305, subd. (b).)

DISPOSITION

The order of dismissal is affirmed. Costs are awarded to respondent.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.